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No. 415

In the Supreme Court of the United States

OCTOBER TERM, 1937

ESCANABA AND LAKE SUPERIOR RAILROAD COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENRY A. SCANDRETT, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

FEBRUARY 1938.

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OPINIONS BELOW

The opinion of the specially-constituted District Court (R. 422), *Escanaba & Lake Superior R. Co.* v. *United States,* is reported in 21 F. Supp. 151. The Court's separate findings of fact and conclusions of law (R. 426–431) are reported with the opinion.

The first report of the Commission, Division 6, dated September 24, 1935, entitled *Pooling of Ore Traffic in Wisconsin and Michigan* (R. 33–39), is published in 210 I. C. C. 599. The report of the Commission, Division 4, on further hearing, dated November 18, 1936 (R. 7–20), is published in 219 I. C. C. 285.

JURISDICTION

The decree of the District Court was entered March 23, 1937. (R. 432.) Petition for appeal was filed May 3, 1937, and was allowed on the same day. (R. 434, 436.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, sec. 345).

QUESTIONS PRESENTED

Whether appellant, not a party to the pooling plan authorized by the Commission's order here in question and none of whose traffic or earnings is embraced in the plan, is a "carrier involved," within the meaning of that term as used in section 5 (1) of the Interstate Commerce Act, authorizing the Commission "* * * by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings * * *."

Whether the Commission's certificate authorizing abandonment by the Milwaukee of operation, under trackage rights over appellant's line between Channing and Escanaba, which abandonment is an integral part of the plan for the pooling as between the Milwaukee and the North Western, is a valid exercise of the Commission's authority.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, as amended, are printed in the appendix, *infra,* p. 62.

STATEMENT

This is an appeal from a final decree (R. 431–432) of the specially-constituted District Court dismissing the appellant's bill to enjoin and set aside the Commission's order and certificate of November 18, 1936 (R. 20–22). The order authorizes the trustees of the Milwaukee and the North Western to pool interstate ore traffic shipped over their lines from mines in the Menominee Range of Michigan and Wisconsin to Escanaba, Mich., for transshipment by lake vessels beyond, and to pool their earnings on class and commodity traffic moving over their respective lines to and from points on appellant's line and interchanged between appellant and the Milwaukee at Channing, Mich., or between appellant and the North Western at Escanaba, on

terms and conditions set forth in the contract executed by the Milwaukee and the North Western (Exhibit No. 1, R. 316–350).[1]

The certificate certifies that the present and future public convenience and necessity permit the abandonment by the Milwaukee of operation, under trackage rights, over appellant's line between Channing and Escanaba. (R. 8, 22.)

Application seeking approval of the pooling, under section 5 (1) of the Act, was originally filed with the Commission March 12, 1935, by the Milwaukee and the North Western. (R. 41–74.) After hearing (R. 111–246) the Commission on September 24, 1935, issued a report (R. 33–39) finding, among other things, that "the abandonment by the Milwaukee of the use of the Escanaba [appellant's] tracks is the keynote of the pooling agreement. Without such abandonment the agreement for pooling would not be practical," and that a certificate of public convenience and necessity under section 1 (18) would be necessary to a lawful abandonment of such operation under trackage rights. The application for approval of the pooling was there-

[1] The contract and the order also name the Escanaba, Iron Mountain & Western Railroad Company but that company is here neglected because it is a wholly owned and controlled subsidiary of the North Western whose line between Iron Mountain and Escanaba, Mich. (the more northerly of the two lines between those points shown in red on the map, R. 350A), is leased to and operated by the North Western (R. 42, 117, 130).

fore denied but without prejudice to the filing of further applications. (R. 39.)

On November 29, 1935, the Milwaukee filed application for such a certificate (R. 78–85) and renewed its application for an order authorizing the pooling.

The trustees of the Milwaukee joined as parties applicant in the abandonment proceeding (R. 85) and in the pooling proceeding (R. 74). The trustee of the North Western also joined in the latter. (R. 9, 76.)

Hearing in the abandonment proceeding and further hearing in the pooling case was held jointly February 26–27, 1936 (R. 246–316), and on November 18, 1936, the Commission issued a second report (R. 7–20) and with it the order and certificate here in question. (R. 20–22.)

The Commission found and concluded "that the proposed pooling arrangement, considered in its entirety, will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; that the divisions as to such traffic have been assented to by the parties to the contract; and that the terms and conditions under which such division of traffic and earnings is proposed to be effected are just and reasonable." (R. 20.)

The Commission further found and concluded "that the present and future public convenience and necessity permit the abandonment by Henry

A. Scandrett, Walter J. Cummings, and George I. Haight, trustees of the properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, of operation under trackage rights over the line of the Escanaba and Lake Superior Railroad Company in Dickinson, Marquette, and Delta Counties, Michigan, described in the application recorded in Finance Docket No. 11025." (R. 20.)

Some of the principal facts, as shown in the Commission's reports, are here stated.

Appellant's line extends from Escanaba to Channing, 63.5 miles.[2] (R. 9.) It connects with the North Western at Escanaba and with the Milwaukee at Channing. (R. 15.) It is a common carrier engaged in the transportation of freight from and to points on its own line and between points on its own line, on the one hand, and points on the Milwaukee and the North Western and their connections, on the other hand. Its line does not reach or serve any of the mines in the Menominee Range and it does not transport any ore shipped from those mines to Escanaba for transshipment over the docks there. (R. 19.)

A line of the Milwaukee extending northward from Chicago passes through Iron Mountain,

[2] A map showing the Menominee Range, the appellant's line, and lines of the Milwaukee and North Western involved in the pooling, in colors, introduced in the Commission proceeding as Exhibit No. 2, R. 113–114, appears in the record as page 350A. Other maps appear at R. 100 and R. 356A.

Mich. and Channing. Branches extending westward from Channing reach iron ore mines in the vicinity of Amasa, Crystal Falls and Iron River, Mich. (R. 9–10.) The Milwaukee transports the ore in carloads from these mines to Channing, where it maintains a yard for the assembling of the cars into trainloads, and then moves the trains by its own power and crews, under trackage right, over the rails of the appellant to Escanaba. (R. 10.) The trains, upon reaching Escanaba, leave the rails of the appellant and enter a yard owned by the Milwaukee, where the trains are broken up and the individual cars switched to the docks for delivery to the lake vessels.[2] (R. 10, 11.)

The Milwaukee's trackage rights over appellant's line were first provided by a contract entered into on February 20, 1900. (Exhibit No. F–1, R. 376–392.) At that time appellant's line was a logging road extending from Escanaba to Watson, Mich., a distance of about 31 miles. This contract recited that appellant proposed to extend its line from Watson to a junction with the Milwaukee at or near Channing. The fulfillment of this condition consummated the contract, which, under its terms, was to be operative until January 1, 1921. On January 1, 1921, the appellant and the Milwaukee entered into a new agreement (Exhibit F–1–A, R. 393–410) which provided that appellant granted

[2] See map, introduced in the Commission proceeding as Exhibit No. 3, R. 114, appearing in the record as page 350–B.

the Milwaukee the right to use said line to the extent and upon the terms and conditions set forth therein, the contract to remain in force until January 1, 1951. This contract gave the Milwaukee the right to transport its ore trains over appellant's line under the conditions and upon the compensation stated therein. It did not give the Milwaukee the right to use appellant's line for any other traffic except certain coal westbound and certain company material eastbound. It does not permit the Milwaukee to do any local business at stations on appellant's line and the Milwaukee in fact does not serve those local stations. (R. 9, 10, 35, 168, 395.)

A line of the North Western extends from Chicago to Escanaba. It has two lines extending westward from Escanaba to Iron Mountain, which closely parallel each other, and a single line in a northwesterly direction to Iron River, with a branch to Crystal Falls and Amasa. Iron ore mines in the Menominee Range served by it are located on these lines and branches. It transports the ore to Iron Mountain and thence over one or the other of its two lines to Escanaba. (R. 10–11.)

The North Western has an extensive yard at Escanaba and two docks there in serviceable condition, constructed at a cost of $1,750,000 each. (R. 10, 11, 120.)

The Milwaukee owns two docks at Escanaba, known as docks 1 and 2, which were built about 35

years ago and have not been reconstructed. Under a temporary arrangement, the Milwaukee used the North Western's docks in 1932 and 1933. In 1934 the Milwaukee used its own Dock No. 2. This it was able to do by making temporary repairs costing approximately $30,000 and because the traffic that year was very light. But the Milwaukee's docks since that time have deteriorated to such an extent that they have not been usable. In 1935 it used the North Western docks on the terms agreed to in the pooling contract. (R. 10, 11, 113, 120, 121, 159, 180.)

Because its docks had reached such a state of deterioration in 1934 that they were beyond repair, the Milwaukee was faced with the necessity of either rebuilding the docks, at large expense, or making some arrangement with the North Western. (R. 180, 257.) Tentative plans for a pooling arrangement on the ore traffic as between the Milwaukee and the North Western had been under consideration for a number of years. (R. 113.) The complete wearing out of the Milwaukee's docks brought the matter to a head (R. 113), and on April 11, 1935, the Milwaukee and the North Western entered into a pooling agreement (Exhibit No. 1, R. 316–350), to be put into effect upon the Commission's approval. (R. 318.)

Under this agreement the Milwaukee is to handle with its road trains and crews all ore from the mines in the vicinity of Amasa over its own line to

its point of connection with the North Western at Iron Mountain, where the ore would be delivered to the North Western for movement to Escanaba. All other ore from the Menominee Range would be handled by the road trains and crews of the North Western from production points to Escanaba over its own rails. From Iron Mountain to Escanaba the loaded ore cars would move over the line of the North Western's subsidiary, the Escanaba, Iron Mountain & Western Railroad Company, and the empty cars would move back from Escanaba to Iron Mountain over the line of the North Western. This arrangement would virtually furnish a double-track movement, although slightly longer than the present route, as these lines nearly parallel each other between the points indicated. The details of this proposed operation are contained in the contract.[4] (R. 10–11.)

The North Western's docks at Escanaba will be used for the entire traffic. (R. 10.)

Under the pooling arrangement the Milwaukee will have no occasion to exercise its trackage rights over appellant's line and it is an integral part of the pooling plan that this operation be abandoned. (R. 8, 36.)

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[4] The contract as finally executed by the chief executives of the North Western and its subsidiary the Escanaba, Iron Mountain & Western, and the Milwaukee, received in evidence as Ex. No. 1 (R. 113, 244) appears in full in the record here, R. 316–359.

All revenues from ore traffic from the Menominee Range transshipped through the dock of the North Western at Escanaba would be apportioned under the pooling contract upon the division of the business obtaining during the 10-year period 1923 to 1932, which was 34 percent to the Milwaukee and 66 percent to the North Western. The expenses directly connected with the movement of the ore would be divided upon the same percentages as the revenues. Locomotives and cars for the movement would likewise be furnished upon the same percentages. (R. 11–12.)

Substantial savings will be effected by this pooling. If the Milwaukee were to continue handling ore to docks it would be necessary to rebuild its dock No. 1 at an estimated cost of $1,000,000. (R. 13.) This new dock would cost the Milwaukee annually about $110,000 for interest, depreciation, maintenance, taxes and fire insurance and protection (R. 13), whereas the annual cost to the Milwaukee in similar items for use of the North Western's dock under the terms of the contract is estimated at approximately $46,000. (R. 13.) This and other savings, detailed in the Commission's report, would total $109,675 per annum. (R. 13–14.) Still other savings which cannot be reduced to figures would be accomplished by joint handling of the ore tonnage through the docks, from joint or consolidated switching on the range or at intermediate points, and of train service between the range

and the docks. There would also be substantial savings to the Milwaukee in the reduction in the number of ore cars required. (R. 14.)

The abandonment by the North Western of its Crystal Falls-Amasa branch (shown in green on the map, R. 350A) is part of the ore pooling arrangement. (R. 15, 36, 114, 337.) At the time of the Commission's report herein the North Western had not obtained a certificate under section 1 (18) authorizing such abandonment. (R. 15.) Since then the North Western has applied for and obtained such a certificate, *Chicago & North Western Railway Company Trustee Abandonment and Operation*, 224 I. C. C. 8, decided September 23, 1937, not included in the record herein.

Pooling of revenue on class and commodity traffic.—Interline traffic between points on appellant's line and points on the North Western or the Milwaukee and their connections is interchanged between appellant and the North Western at Escanaba or between appellant and the Milwaukee at Channing, respectively (R. 14, 15, 18, 35). One provision of the pooling contract between the North Western and the Milwaukee provides that their revenues on this traffic shall be pooled. The total revenues derived by each company from such traffic interchanged with appellant, less 30 percent of such gross revenues to cover cost of handling by either company, is to be put into a pool and divided as agreed to in paragraph 52 of the contract (R. 339),

based on the percentages of the traffic moving over their respective lines during the 6-year period 1927 to 1932 (R. 14).

For the 6-year period 1927 to 1932 the total net revenue on traffic to and from points on appellant's line accruing to the Milwaukee was $766,645 and to the North Western $992,290 (R. 14).

This part of the agreement relates only to general or class and commodity traffic. It does not relate to the ore traffic from the Menominee Range to Escanaba for transshipment over the docks. That traffic has never been interchanged by either the Milwaukee or the North Western with appellant. The North Western has transported such traffic over its own line. The Milwaukee has transported such traffic over its own line to Channing and thence under its trackage right over appellant's line with no "interchange" at Channing. But the trackage contract does not give the Milwaukee the right to do any local business on appellant's line. (R. 9, 10, 35, 168, 395.) Hence any traffic reaching Channing over the Milwaukee destined to a point on appellant's line is turned over to the appellant at Channing for transportation by it to destination.

Under the pooling contract this class and commodity traffic may be hauled by either the Milwaukee or the North Western. The contract itself does not provide for any change in the physical handling of the traffic. *Only the revenue is to be*

pooled, i. e., the revenue accruing to the North Western and the Milwaukee. (R. 15.)

In the year 1935 the appellant's revenues on such inter-line traffic interchanged with the Milwaukee at Channing was $69,884 and interchanged with the North Western at Escanaba, $68,706. "Such revenues would not be affected," the Commission found, "so long as the appellant continues its present plan of operation." (R. 15; Ex. F–16, R. 422.)

Under another provision of the contract the North Western agrees to join with the Milwaukee in establishing appropriate joint rates and divisions for handling inter-line traffic via Iron Mountain, so as to permit the Milwaukee to continue handling traffic to and from industries served by appellant, either direct or through reciprocal switching arrangements with the North Western. The revenues on such traffic interchanged at Iron Mountain would be included in the foregoing pool the same as traffic interchanged at Channing. (R. 14–15.)

The provision of the contract regarding the establishment of joint rates between the Milwaukee and the North Western on traffic interchanged with appellant would seem to contemplate that at some later time appellant's line might be abandoned west of Groos or west of Northland, thus discontinuing the only connection, at Channing, with the Milwaukee. Discontinuance of service by ap-

pellant on the western end of its line into Channing would necessarily destroy the competitive nature of this class and commodity traffic interchanged with the appellant, for the reason that it would leave open but one route for its movement, namely, via Escanaba and the North Western.[5] It is true that the appellant's line connects with the Minneapolis, St. Paul & Sault Ste. Marie at North Escanaba, but the latter line is principally an east and west railroad and any route by that line to Chicago, Ill., or lower Wisconsin destinations would be circuitous and not ordinarily used. (R. 14–15.)

This part of the pooling plan relating to traffic other than the ore traffic is intended as insurance to the Milwaukee of revenue which is now derived from this traffic and which would be lost in the event of abandonment of the western portion of appellant's line *and is merely incidental to the pooling of the ore traffic.* (R. 18.)

The Commission said there is no showing that the proposed arrangement covering this traffic necessarily will result in better service to the pub-

[5] Establishment of joint rates by the North Western and the Milwaukee via Iron Mountain would give the shipper an additional route. For example, shippers at Escanaba could route traffic to Milwaukee, Chicago, etc., via the appellant's line to Channing, thence the Milwaukee, or via the North Western direct, or via the North Western to Iron Mountain, thence the Milwaukee. If the western portion of appellant's line were abandoned, the shippers would still have two routes. (R. 144–146.)

lic, that costs of operation will be reduced, or that competition will be unduly restrained. "However, according to the record," the Commission said, "*the earnings of the Escanaba Company on this traffic and services to the public would in no way be affected by the proposed division of earnings by applicants* so long as traffic originating at, or destined to, points on the Escanaba is handled as at present." (R. 18–19.) [Italics supplied.]

This was followed by the ultimate finding "that the proposed pooling arrangement *considered in its entirety,* will not impair service to the public, will effect substantial economies in operation, and will not unduly restrain competition; * * *." (R. 20.) [Italics supplied.]

SUMMARY OF ARGUMENT

I. It is established by findings of the Commission and the court below, upon evidence not here challenged as inadequate, that none of appellant's traffic or earnings is to be pooled. Such a carrier is not a "carrier involved" within the meaning of section 5 (1) of the Interstate Commerce Act whose assent is necessary as a condition to an order by the Commission approving and authorizing division of traffic or earnings. By these provisions the Commission is not given authority to require pooling, but only to approve and authorize pooling if assented to by all the carriers involved. Under the language of section 5 (1) as a whole, the car-

riers involved would seem clearly to be only the carriers whose traffic or earnings are to be embraced in the pool. Under appellant's suggested interpretation that the provision was designed for the protection of any carrier having a substantial interest in the subject matter of the pool or who is affected by it, any carrier who feared it would be adversely affected, even to a slight extent, by a proposed pooling arrangement as between other carriers, could effectively block the plan by the simple expedient of withholding its assent. So interpreted the provision would fail to accomplish its purpose, which was to encourage pooling where economy in maintenance and operation could be secured, to the end of developing adequate national transportation service. "To this end," the Court said in *New England Divisions Case,* 261 U. S. 184, 190, "the Commission was empowered, among other things, to permit pooling of traffic or earnings." The words "if assented to by all the carriers involved" are merely words of limitation upon the Commission's authority. The cases cited by appellant do not support its suggested interpretation.

The pooling by the Milwaukee and the North Western of their earnings on class and commodity traffic interchanged with appellant is merely incidental to the pooling of the ore traffic and its purpose was to protect the revenues of the Mil-

waukee in the event of a shift of the traffic now interchanged with the Milwaukee at Channing over to the North Western through Escanaba, and, in the event the western part of appellant's line were abandoned and the only connection between appellant's line and the Milwaukee thereby broken. As found by the Commission this pooling as to the general traffic, which is a pooling only of the North Western's and the Milwaukee's earnings thereon, would in no way affect the earnings of the appellant on this traffic or its services to the public, so long as traffic originated at, or destined to, points on the appellant's line is handled as at present. The revenues of carriers other than the Milwaukee and the North Western are untouched by this pool and, under a reasonable construction of the statute, the assent of such other carriers is unnecessary.

There is nothing to show that appellant will be subjected to any disadvantage or prejudice in the interchange of traffic as the result of this pooling arrangement.

There is no proposal to change any of appellant's divisions of joint rates. It is protected in this regard by section 15 (6) of the Interstate Commerce Act requiring just and equitable divisions of joint rates. *New England Divisions Case*, 261 U. S. 184.

(a) The purpose of section 5 (1), as amended by Transportation Act, 1920, was to encourage pool-

ing arrangements as aids in the development of adequate national transportation service. This is shown by the Commission's recommendations, by the testimony of Commissioner Clark before the Committee, and by the other provisions of section 5 as enacted at that time. It is thus clear that in enacting the Transportation Act Congress sought to obtain, as far as feasible and practicable, the advantages of unified control which governmental operation had demonstrated, by providing for pooling, consolidations, mergers and acquisitions of control wherever, upon application of the carriers and after full hearing, it was found by the Commission that it would be in the public interest to do so. The pooling provisions are therefore entitled to a liberal construction. *Piedmont & Northern Ry.* v. *Comm'n,* 286 U. S. 299, 311, 312.

II. The certificate authorizing the Milwaukee to abandon operation under trackage rights over appellant's line is a valid exercise of the Commission's authority under section 1 (18) and (19). In *Colorado* v. *United States,* 271 U. S. 153, this Court said, at page 168, that "The sole test prescribed is that abandonment be consistent with public necessity and convenience." This is also the test as to abandonment of operation under trackage rights, *Transit Commission* v. *United States,* 289 U. S. 121, and governs in this case. The carriers here seeking to pool are both in the hands of trustees under the Bankruptcy Act and have sustained large deficits.

Substantial economies can be effected by them through the ore pooling arrangement involving abandonment by the Milwaukee of its ore traffic operations over appellant's line. This abandonment and pooling is therefore of national concern and the effecting of the resulting economies is in the public interest.

ARGUMENT

I

The term used in section 5 (1) "if assented to by all the carriers involved" is properly interpreted as meaning only the carriers whose traffic or earnings are to be pooled

Section 5 (1) of the Interstate Commerce Act, as amended by Transportation Act, 1920, after providing—

> That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense:

contains the following proviso:

> *Provided,* That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

Appellant does not deny that application was filed in this case by the carriers whose traffic and earnings are to be pooled and divided, that a full hearing was held by the Commission upon the application, and that the Commission made the quasi-jurisdictional findings required by the statute. Nor does it deny that the Commission's findings, certificate and order are supported by substantial evidence. Its principal contention is that it is a carrier involved within the meaning of section 5 (1) and inasmuch as it has not assented to the pooling, the order is beyond the Commission's authority.

It is established by findings of the Commission and the court below, upon evidence not here challenged as inadequate, that none of appellant's traffic or earnings is to be pooled. In its first report the Commission found (R. 35–36) that the appellant "has no direct interest in or control over the [ore] traffic or the earnings derived therefrom. It has never participated as a carrier in such traffic. The only interest it has in the matter is as lessor of trackage rights to the Milwaukee, for which compensation is paid as above stated."

This finding was affirmed in the second report (R. 19). After observing that "Section 5 (1) is specific in setting out jurisdictional findings of fact which are prerequisite to our approval of a pooling agreement" one of these being "that the agreement must be 'assented to by all the carriers involved * * * ,'" the Commission stated the appellant's contention "that it is a carrier involved within the meaning of the act, and since it has not assented to the pooling agreement, we do not have jurisdiction to approve and authorize the agreement," and that it was "therefore necessary to determine whether the Escanba Company is a carrier involved within the meaning of the act," determined the question in the negative, finding:

> As pointed out in the original report, the Escanaba Company never participated as a carrier in the ore traffic in the past. Its status was that of a lessor of trackage rights

> to the Milwaukee. It does not now participate in this traffic as a carrier. Under these circumstances, it cannot be considered a carrier involved in the pooling agreement now before us. It necessarily follows here that the carriers involved under the proposed pooling agreement are the parties to that agreement. The Escanaba Company is not a party to the agreement. This conclusion does not prejudice the right of the Escanaba Company or any interested person of appearing before us in opposition to, and setting out any legal grounds opposing, the relief here sought. The Escanaba Company was accorded, and availed itself of, full opportunity to be heard. (R. 19.)

The contention was renewed in the court below and overruled for the following reasons as stated in its opinion (R. 425):

> Plaintiff's claim that it is a carrier involved is based upon its assertion that the ore traffic which will be pooled now moves over its line; that the trains carrying it are under the supervision of its dispatchers and signal operators; and that the pooling arrangement will result in prejudice against it in the interchange of traffic at that point. It is to be observed that under the contract for trackage rights, the ore is carried by the Milwaukee in its own cars with its own locomotives and its own train crews under bills of lading issued by it, and under tariffs and rates established by it, without plaintiff's

concurrence. The train dispatching and signaling by plaintiff are necessary incidents to joint use of the rails by two carriers. It is clear that plaintiff is not a carrier of the ore traffic. We must hold that under the contract the Milwaukee as lessee of trackage rights is the sole carrier of this traffic. Other traffic interchanged at Channing with the Milwaukee is not disturbed by the pooling arrangement. Possibility and perhaps the probability of later abandonment of a portion of plaintiff's line of railway cannot affect the consequences of the findings of the Commission that present and future public convenience and necessity permit the abandonment of operation under trackage rights over plaintiff's line of railway.

The Court's conclusion of law No. 2, upon this subject, reads (R. 430):

The Commission's order of November 18, 1936, is within its authority, under section 5 (1) of the Interstate Commerce Act. Plaintiff is not a carrier involved in the pooling arrangement approved by said order. The carriers involved in said pooling arrangement are the carriers whose traffic and earnings are to be pooled and who are parties to the pooling agreement. None of plaintiff's traffic and none of its earnings are to be pooled, and it is not a party to the pooling agreement. Therefore, its assent to the pooling, which is wholly between the Milwaukee and the North Western, is not necessary under section 5 (1) of the Act.

Since none of appellant's traffic or earnings is to be included in the pool it would seem clearly, under the provisions of section 5 (1) that it is not a carrier involved. By these provisions the Commission is not given authority to require pooling, but only to approve and authorize pooling if assented to by all the carriers involved. Within the meaning of the provision the carriers involved would seem clearly to be only the carriers whose traffic or earnings are to be pooled.

Appellant urges that the phrase "all carriers involved" is not limited to include only the parties to the proposed pool, and submits that the phrase was designed for the protection of any carrier having a substantial interest in the subject matter of the pool, or who is affected by it. (Br. pp. 26, 27.)

Under such an interpretation any carrier who feared it would be adversely affected, even to a slight extent, by a proposed pooling arrangement as between other carriers, could effectively block the plan by the simple expedient of withholding its assent. So interpreted the provision would fail to accomplish its purpose, which, as shown by its legislative history (referred to more fully hereinafter, *infra*, p. 42), was to encourage pooling where economy in maintenance and operation could be secured, to the end of developing adequate national transportation service. In *New England Divisions Case*, 261 U. S. 184, 190, this Court said:

> To this end * * * the Commission was empowered among other things, to permit pooling of traffic or earnings, * * *; to authorize abandonment of unprofitable and unnecessary lines, * * *.

The phrase is therefore entitled to the interpretation suggested by the language of the section as a whole and not unduly broadened so as to restrict its application. The "carriers involved" within the meaning of the proviso seem clearly to be those referred to in the first part of the section, namely, those who would enter into the arrangement "for the pooling of freights," or for the division between them of "the aggregate or net proceeds of the earnings or any portion thereof." Congress intended to permit, under the terms of the proviso, that which it had theretofore prohibited.

The words in the proviso "and for such consideration as between *such* carriers," further indicate

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* Other decisions explaining the broad purpose of the Transportation Act are *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, et seq.; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244; *Colorado* v. *United States*, 271 U. S. 153; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331, 341 et seq.; *Texas & Pacific Ry.* v. *Gulf &c. Ry.*, 270 U. S. 266, 277; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1; *Transit Commission* v. *United States*, 289 U. S. 121, 128. It may be noted that the latter decision settled the question whether section 1 (18) of the Interstate Commerce Act applies to operation of one carrier over the line of another under trackage rights. Under that decision it is clear that a carrier may neither commence nor abandon operation under trackage rights without a Commission certificate.

that the carriers involved" are "such carriers" whose traffic or earnings are to be divided, and not those merely having some interest in the pooling and who may be incidentally affected.

The language of section 5 (1) is similar in this respect to the subsequent provisions of the section relating to consolidations, mergers, or acquisitions of control. Those provisions do not attempt to force railroads to consolidate or merge their properties or to acquire control of other railoads, but grant power to the Commission to approve and authorize such unification, in whole or in part, if appropriate application by the carriers involved is filed and the Commision finds the unification to be in the public interest.

With the Commission's authorization the Milwaukee and the North Western, instead of pooling the ore traffic and the earnings thereon, could consolidate or merge their lines over which they now transport the ore traffic, under the provisions of paragraph (4) of section 5. The assent of other carriers, not parties to the consolidation or merger agreement, would not be necessary. An example of the merger of parts of lines is found in *Unification of Lines in Southern New Jersey*, 193 I. C. C. 183, in which the Commission authorized the Pennsylvania and the Reading railroads to merge their parallel and competing lines in New Jersey serving the seashore resorts, the rail traffic having declined to such an extent that the

continued maintenance of the separate lines was unprofitable.

In such a unification other carriers might conceivably be adversely affected and they have the right to appear before the Commission in opposition to the granting of the application, but where the Commission finds the proposal to be in the public interest it has authority to permit the arrangement notwithstanding the opposition or lack of assent by other carriers. Cf. *Atlantic Coast Line* v. *United States,* 284 U. S. 288, *New York Central Securities Co.* v. *United States,* 287 U. S. 12.

The argument that the phrase "if assented to by all the carriers involved" would be mere surplusage if limited to the parties to the agreement, since they must necessarily have assented thereto, overlooks the words of the section under which the Commission may institute the proceeding *upon its own initiative.* If a situation were called to the Commission's attention where it appeared that a pooling arrangement would save competitive waste or would otherwise be desirable in the public interest, the Commission, in order to encourage the carriers to effect the arrangement, could institute a proceeding upon its own initiative. But it could not make an order requiring the carriers to pool; and the assent of the carriers involved would be a condition precedent to an order of approval and authorization. A prior agreement between or among the carriers is not essential. The words

"upon the application of any carrier or carriers" indicate, too, that the proceeding may be instituted upon the application of a single carrier. In that event the assent of the other carrier or carriers involved would have to appear affirmatively, as a condition to an order.

That the words "if assented to by all the carriers involved" are merely words of limitation upon the Commission's authority was held by the Commission in *Fifteen Percent Case, 1931,* 179 I. C. C. 215, 218. In that proceeding there was a proposal to pool the earnings of a large number of carriers, but it developed that an agreement to adopt the proposal could not be obtained, and the Commission held that "in the absence of such an agreement" it "had no authority to require such pooling." A similar holding was made in *Securities and Acquisition of Control of Railway Express Agency,* 150 I. C. C. 423, 435.

The cases cited by appellant do not support its suggested interpretation. *In re Pooling Freights,* 115 Fed. 588, merely reports the charge to a grand jury by the District Judge for the Western District of Tennessee on May 26, 1902. It quotes the original section 5 forbidding pooling, quotes the definition of the word "pool" in the Century Dictionary, and explains the application of the section as it then stood. It does not construe the permissive proviso added in 1920, and nothing said would indicate that appellant is a "carrier involved" within

the meaning of the proviso. It would indicate to the contrary. If the Milwaukee and the North Western had put their pooling agreement into effect without the Commission's approval they would have been subject to indictment, but it is difficult to perceive wherein appellant would have been criminally liable, since it is not a party to the pooling agreement and none of its traffic or earnings is included in the pool.

The irrelevancy of *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, is shown by a fuller quotation than given in appellant's brief:

> As to the so-called Temple Iron Company contracts: It appears that in 1889 certain operators in the anthracite coal region organized a competing railroad, with a view to carrying their product from the coal regions to market at tidewater. It became evident that this company was likely to succeed, and to construct a competing railroad from the coal fields to the sea. With a view to acquiring its property, five of the leading railroad carriers purchased the collieries whose proprietors were developing the new scheme. * * * This ended the building of an independent line, and the transportation of coal from the collieries is distributed among the carriers interested.
>
> It is argued that these contracts, if given in evidence, will tend to show a pooling of freights, in violation of the fifth section of the commerce act. While this testimony may

> not establish such an arrangement as is suggested, it has, in our opinion, a legitimate bearing upon the question. There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained. Furthermore, we think the testimony competent as bearing upon the manner in which transportation rates are fixed, in view of determining the question of reasonableness of rates, into which the Commission has a right to inquire. (Pages 46-47.)

Appellant cites *Western Pacific* v. *South. Pac. Co.*, 284 U. S. 47 and *Claiborne-Annapolis Ferry Co.* v. *U. S.*, 285 U. S. 382, in support of its suggestion that the words "carriers involved" as used in section 5 (1) have virtually the same meaning as the words "any party in interest," as used in section 1 (20) giving such party the right to sue to enjoin any construction, operation, or abandonment contrary to the provisions of paragraphs (18) or (19). In the first of these cases the single question decided was that the Western Pacific was a "party in interest" within the meaning of section 1 (20) and therefore entitled to maintain a suit to enjoin the Southern Pacific Company, a competitor, from extending its line without having first obtained a certificate of public convenience and necessity from the Commission; and the Court, after pointing out that in *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*

Co., 270 U. S. 266, it had declared paragraphs 18 to 22 of section 1 "to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities," said:

> If, as the court below seems to have assumed, a "party in interest" must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation.

A like consideration obtains here. In the *Claiborne-Annapolis* case it was held *inter alia* that the ferry company had the right to maintain the suit under the Urgent Deficiencies Act to enjoin and set aside a Commission order authorizing the Chesapeake Beach Railway Company to extend its line by means of a ferry across Chesapeake Bay, which would compete with the ferry company.

If the Milwaukee had attempted to abandon operations under its trackage rights over appellant's line without first having obtained a Commission certificate, appellant would no doubt have been a "party in interest" within the meaning of section 1 (20) entitled to sue to enjoin the abandonment. But it does not follow that appellant is a carrier involved in the pooling with the absolute right by merely withholding its assent to prevent the Milwaukee and the North Western from effectuating the

plan, though authorized and approved by the Commission. The words "if assented to by all the carriers involved," as used in section 5 (1) obviously have a different meaning and purpose from the words "any party in interest," as used in section 1 (20), and decisions construing the latter words seem inapposite here.

Appellant argues (brief, pp. 32–33), that it is a carrier of the ore traffic because it "furnishes the roadbed and track and performs the dispatching and signaling services controlling the movement of the trains and that "by controlling and regulating the movement of trains in interstate transportation, as well as furnishing and maintaining the 'railroad', *i. e.*, the instrumentalities and facilities of transportation," it is performing the functions of a carrier as much as if its cars and engines also were used. This factual statement is inaccurate. Appellant owns the railroad. By contract it has granted the Milwaukee the right to use it principally for the transportation of the ore traffic in the cars of the Milwaukee pulled by Milwaukee locomotives and manned by Milwaukee employees. In this sense it "furnishes" the roadbed and track but it does not furnish those facilities to the shipper; it furnishes them to the Milwaukee and for this it is compensated by the Milwaukee at the terms stipulated in the contract. Appellant receives no compensation from the shipper; it has no dealings with the shipper, and is not a party to the Mil-

waukee's rate covering the transportation of the ore from mines on the line of the Milwaukee in the Menominee Range to Escanaba. Nor is it quite accurate to say that the appellant "performs the dispatching and signaling services controlling the movements of the trains." For the contract shows that the Milwaukee pays its proportionate share of the expenses of these services. The second article, paragraph (g) provides:

> That expenses of operation shall, for the purpose aforesaid, include such proportion of the salary of the General Manager of said railroad, the wages of the road master, superintendent and *train dispatchers* thereon, as may be agreed upon by the General Managers of the respective Companies and such proportion of the wages of such *telegraph operators, switchmen, flagmen and other employes* of the Escanaba Company as said St. Paul Company [Milwaukee] shall use in the transaction of its business, * * *. (R. 400.)

The Milwaukee also bears its proportionate expense of maintaining the railroad, including "the cost of any and all material and labor necessary to preserve, repair and renew the roadbed, rails, ties, switches, railroad crossings, water stations, fuel stations, bridges, culverts, cattle guards, fences, highway and farm crossings, crossing signs and gates, *signal posts* and *telegraph line* and any and all other appurtenances of and pertaining to the

premises," the use of which is granted by the contract. (Article second, paragraph (f), R. 400.)

The Commission's report finds that the average annual payment of the Milwaukee to the appellant on account of the trackage rights on the ore traffic was $181,226 for the 10-year period from 1923 to 1932 and $79,555 for the 5-year period from 1931 to 1935, and that:

> The detailed items included in these payments are maintenance of way and structures; transportation other than train; taxes; amortization and interest on additions; current betterments; and such amounts of rental as the pro rata proportion of the use of the line of the Escanaba Company bore to the number of miles run by the cars and engines of both companies operating over the tracks of the Escanaba Company, during each year, subject to a minimum rental of $27,000. (R. 13.)

By the contract it was further agreed (Article fourth, paragraph (a), R. 403) that "all the employes of the Escanaba Company, except engine men and train men, engaged in maintaining, repairing and operating said premises, or any of them, shall, for the purposes of this contract, be deemed and taken to be the joint employes of both parties hereto."

The contract further stipulates (Article first, paragraph (c), R. 396) in reference to the iron ore traffic "that all such business shall be tendered to

and carried by the St. Paul Company, * * *."

It thus appears that factually and legally the Milwaukee is the carrier of the ore traffic.

Union Pacific Railway Company v. *Chicago, R. I. & P. Railway,* 163 U. S. 564 and *Chicago, Rock Island & Pacific Railway Company* v. *Denver & Rio Grande Railway Company,* 143 U. S. 596, cited by appellant, do not hold that a railroad company granting trackage rights to another railroad company is the carrier of the traffic transported over its line by the grantee. The *Union Pacific* case was a suit by the Chicago, Rock Island & Pacific against the Union Pacific for specific performance of a contract under which the Union Pacific granted trackage rights over its line between Council Bluffs, Iowa, and Omaha, Nebr., to the Rock Island. One of the principal defenses was that the contract was *ultra vires.* This was overruled and the judgment of the lower court in favor of the plaintiff was affirmed in this Court. *Chicago, Rock Island & Pacific Ry. Co.* v. *Denver & Rio Grande, supra,* was a suit by the former to enforce an alleged right to certain of the terminal facilities of the D. & R. G. at Denver, claimed to have been granted as part of a contract giving the Rock Island trackage rights over the D. & R. G. between Denver and Pueblo, Colo. These cases do not support appellant's contention but on the contrary indicate that the carrier having a trackage right is the actual carrier of the traffic transported

by it over the road of the proprietary company. Cf. *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475; *Linstead* v. *Ches. & Ohio Ry.*, 276 U. S. 28, 34–35.

The Commission has so treated the carrier operating under trackage rights for purposes of demurrage charges, car furnishing, enforcing equality of service and rates, avoidance of discrimination, and, generally in the administration of the Interstate Commerce Act, in the same manner as though the carrier, instead of acquiring the trackage rights, had extended its own rails. *Cedar Hill Coal Co.* v. *A., T. & S. F. Ry. Co.*, 15 I. C. C. 73, 75, 77; *Ridge Coal Mining Co.* v. *M. P. R. R. Co.*, 62 I. C. C. 259, 261; *Penick & Ford* v. *Director General*, 61 I. C. C. 173, 176; *Huerfano Coal Co.* v. *C. & S. E. R. R. Co.*, 41 I. C. C. 657, 659.

Section 1 (3) of the Act defines the term "railroad" as including, among other things, "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease."

In *Transit Commission* v. *U. S.*, 289 U. S. 121, this Court held that the extension of the traffic of an interstate carrier beyond its own terminus over the line and to and from the terminus of another carrier, under a trackage agreement allowing it the use of these facilities jointly with the owner, is an "extension" of the railroad of the lessee or licensee and "operation of a line of railroad" by

it, within the meaning of section 1 (18) of the Interstate Commerce Act. After stating that for more than a score of years the Long Island had used the lines of the Pennsylvania for the passage of frequent trains carrying an enormous and ever increasing traffic between the terminus of its owned railroad at Sunnyside and the Pennsylvania station, the Court said:

> It is no stretch to say that it has been operating such lines or that they constitute an "extension" of its own railroad. (Pp. 128–129.)

As to the pooling of the earnings on the class and commodity traffic. This pooling "is merely incidental to the pooling of the ore traffic," for the reason that there would be no occasion for the provisions of the contract relating to the division of earnings on the general traffic if there were no pooling of the ore traffic.

Paragraphs 52 to 55 of the pooling agreement (R. 338–339) relate to interchange of traffic with appellant and cover the pooling as between the Milwaukee and the North Western of their earnings on this traffic. It was explained in the testimony that these provisions were inserted in the contract as protective measures to the Milwaukee (R. 143–144; 175–176; 282). It was feared that the traffic now interchanged between appellant and the Milwaukee might shift over to the North Western through Escanaba and as a consequence the Mil-

waukee would lose the revenue it now earns upon such traffic. (R. 143.) For example, an unrouted shipment originating on appellant's line destined to Milwaukee, Wis., if hauled by appellant to Channing and there interchanged with the Milwaukee, would move over the latter line to destination, but the appellant could route the shipment via Escanaba and the North Western (and apparently obtain the same division of the joint rate as it would obtain if it sent the shipment via Channing). (R. 144.) The Milwaukee would also lose this business if the western part of appellant's line were abandoned and the only connection between appellant's line and the Milwaukee thereby broken. (R. 18, 282–284.) If the Milwaukee should lose all the traffic now interchanged with appellant at Channing, it would nevertheless, under paragraph 52 of the agreement, get the revenue on the traffic, based on the 6-year experience, as though the business had actually moved over that route. (R. 282.)

As found by the Commission this pooling as to the general traffic, which is a pooling only of the North Western's and Milwaukee's earnings thereon, would in no way affect the earnings of the appellant on this traffic or its services to the public, so long as traffic originated at, or destined to, points on the appellant's line is handled as at present. At the present time appellant gets certain revenue on this traffic; that is not to be disturbed. The Milwaukee and the North Western also get

certain revenue, and they are going to put that revenue in a pool and divide it on the basis provided for in the contract. This arrangement cannot affect the earnings of appellant.

From the fact that appellant participates in the transportation of this traffic it does not follow that it is a carrier involved in the pooling when as a matter of fact it is not so involved, since its earnings are not to be affected, and the pooling of the earnings is to take place only as between the Milwaukee and the North Western. The record shows that traffic moves to and from points on appellant's line via the North Western and the Milwaukee to and from various sections of the country. (R. 308.) If appellant were to be deemed a carrier involved because it is a participant in the traffic, then all carriers which participate in the traffic, whether they are far or near, would likewise be carriers involved and their assent would be necessary. The revenues of carriers other than the Milwaukee and the North Western are untouched by this pool and, under a reasonable construction of the statute, the assent of such other carriers is unnecessary.

Baltimore & Ohio R. Co. v. *United States* (*Chicago Junction Case*), 264 U. S. 258, is not relevant here. This case is cited by appellant at brief page 36 following a vague assertion regarding interchange of traffic and apparently appellant seeks to intimate that it will be subjected to some disadvantage in this respect. There is nothing whatso-

ever to show that the pooling order will interfere with or restrict the facilities for interchange of traffic as between either the North Western or the Milwaukee and the appellant. The ore traffic has never been interchanged with appellant. It has been transported by the Milwaukee from the mines to the docks at Escanaba, moving, it is true, over the line of the appellant from Channing to Escanaba, but not carried by appellant. The carrier was the Milwaukee and its right of operation over the rails of the appellant, granted to it by contract, in legal effect made appellant's rails the railroad of the Milwaukee so far as the ore traffic was concerned. The Milwaukee's trackage right gave it no authority to do a local business at stations on appellant's line. Outbound traffic from such stations and inbound traffic to such stations was and is interchanged as between appellant and the Milwaukee at Channing and as between appellant and the North Western at Escanaba, and there is nothing whatever to show that this interchange or the facilities therefor will be diminished or altered in any way. Traffic participated in by either the Milwaukee or the North Western, consigned to points on appellant's line, must necessarily be turned over to it for transportation, either at Escanaba or Channing, as there is no other line than the appellant's at either Escanaba or Channing to which the North Western or the Milwaukee could deliver such traffic.

Appellant speaks of loss of bargaining power (br., p. 36). This must refer to divisions of joint rates with the Milwaukee and the North Western. But there was and is no proposal to change any of appellant's divisions of joint rates, and, of course, it has the protection in this regard of section 15 (6) of the Interstate Commerce Act under which it may file complaint with the Commission against any alleged unjust or inequitable divisions of joint rates. *New England Divisions Case*, 261 U. S. 184.

(a) The purpose of section 5 (1), as amended by Transportation Act, 1920, was to encourage pooling arrangements as aids in the development of adequate national transportation service. The provision is therefore entitled to a liberal construction

As stated by the Commission in its 1918 Annual Report, page 5, "The railroads of the country came into being under the stimulus of competition. From the outset their operation and development have been responsive to competition which has grown with the growth of population and industry. This competitive influence has been jealously guarded and fostered by State laws and constitutions as well as by the Federal law. * * * Out of competition grew rate wars, pooling, mergers, and consolidation into systems, as well as the rebating and other preferential treatment of shippers which the Act to regulate commerce was primarily framed to prevent."

In the original act Congress, accepting the competitive principle as salutary, unqualifiedly pro-

hibited pooling,[7] and that provision remained unchanged until the passage of Transportation Act, 1920.

In its 1919 Annual Report the Commission recommended that there should be provision, among other things, for "Merger within proper limits of the carriers' lines and facilities in such part and to such extent as may be necessary in the general public interest to meet the reasonable demands of our domestic and foreign commerce." It was thought that "it might become necessary or be found desirable in the public interest to permit, encourage, or require carriers within limits as to extent, territory, and time to merge their lines and facilities or the operation thereof." In the event of the continuance of the policy of private ownership and operation under governmental regulation, the Commission was of the view that seven matters required legislative consideration, the first of which was, "Revision of limitations upon united or cooperative activities among carriers by rail

[7] Section 5 of the original Act, in a single paragraph, provided as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

and by water." Discussing this subject, which embraced among other things the pooling of traffic, facilities, and earnings, the Commission said (page 4):

> Under the policy heretofore followed by our Government all efforts to restrict the full play of competition between carriers have been frowned upon or prohibited. Obviously competition between carriers that is wasteful or unnecessarily expensive lays an added burden upon the ratepayers. Elimination of wasteful or unduly expensive competition in rates or service is desirable and under the exercise by the Government of its power to regulate the service and the rates which the carriers may charge and to require an abatement of all unjustly dscriminatory, unduly prejudicial, or unduly preferential charges, regulations, or practices, carriers might well be permitted and encouraged to coordinate their activities and merge or consolidate their lines to such an extent as is, after thorough investigation and full hearing, sanctioned by the regulating body. * * *. If, without unduly lowering or restricting the standard of service, economy in maintenance and operation can be secured by cooperative agreement or consolidation, under governmental supervision and approval, of two or more lines, the public is not injured, while the sum available for improvements and betterments of the carrier properties is augmented."

A bill having been drafted embodying these recommendations, Commissioner Clark, speaking for the Commission, appeared before the committee and explained its provisions. A quotation from his statement dealing with the matter of pooling and the related matters of consolidations, mergers and acquisitions of control, is printed in the margin.[8]

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[8] Mr. Clark. * * * The present act, as is well known, in this paragraph prohibits any form of pooling of freights or the earnings upon freights. Experiences had during the war have led to the conviction that this provision is not necessarily in the public interest, and this bill, therefore, proposes that, under regulation and with approval of the commission, there shall be relaxation of those limitations upon the activities of the carriers.

The amended section starts out with the rule:

"That, except upon specific approval by order of the commission as in this section provided, it shall be unlawful for the carriers to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing roads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof."

It then provides that the commission may, if after hearing it is of the opinion that the unification, consolidation, or merger by purchase, lease, stock control, or in any other way of two or more carriers subject to the act, or of the ownership or operation of their properties or of designated portions thereof, or that the pooling of their traffic, earnings, or facilities to the extent indicated by the commission, will be in the interest of better service to the public or economy in operation, or otherwise of advantage to the convenience and commerce of the people, the commission shall have authority by order to approve and authorize such unification, consolidation, merger, or pooling under such rules and

Following these recommendations section 5 was amended by the addition of the proviso, in par. (1), permitting pooling of traffic or earnings when found by the Commission to be in the interest of better service to the public, or economy in operation, and not unduly restrictive of competition; and the section was further amended by addition of

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regulations and for such consideration as the commission may find to be just and reasonable in the premises.

It then provides that the commission may from time to time, for good cause shown, make supplemental orders deemed necessary or appropriate and thereby modify or set aside provisions of previous orders as to the extent of pooling or as to the rules, regulations, terms, conditions, or consideration in respect of any unification or consolidation of operation, and not of ownership or of pooling, so previously approved and authorized.

It will be noted that this does not include any provisions for the commission by supplemental order to modify or set aside the provisions of a previous order which permits the merging or consolidation of the ownership of two or more properties, the idea being that if the ownership has been merged there has been a change of control and ownership of the securities and stocks of the reorganized property as compared with the previously existing properties, which could not by an order of the commission justly or perhaps lawfully be undone; but, except where there has been a change of ownership, the commission would be authorized by supplemental order to modify any previous order.

It then provides that carriers affected by any such order of the commission shall be, and are hereby, relieved from the operation of certain laws restricting their activities in that direction in so far as may be necessary to enable them to carry into effect any unification, consolidation, merger, or pooling so approved. * * *

This provision, Mr. Chairman, involves a substantial change in the governmental policy and would effect a sub-

comprehensive provisions for consolidations, mergers, and acquisitions of control. It was expressly provided (in par. (8), now par. (15), *infra*, p. 68), that any carrier which obtains an order from the Commission under any preceding provision of the section, including the provision in paragraph (1) relating to pooling, as well as the provisions relating to consolidations, mergers, and acquisitions

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stantial change in the policy of some of the States with regard to maintenance of every degree and feature of competition which is fostered by existing laws. It would make possible under private control and operation of the roads the utilization of many economies which would be possible under a unified control or the operation of all the roads as one system.

Two competing single-track lines between two important commercial centers might, under an arrangement made pursuant to this authority, be used as a double-track road for the carriage of through freight and for through-passenger service as well. Two single-track roads of that nature, or even a double-track road and a single-track road, one of which had adverse grades against the current of traffic and the other had them in the opposite direction, might be utilized to great economy by obviating the necessity of lifting the tonnage over the adverse grade. * * *.

There are many other considerations which move to the view that this would be a sound departure from present policy. Consolidations for operation and division of the traffic made under careful, reasonable, and open arrangements, approved by the commission, are not, as we think, antagonistic to the public interest, while it is to the public interest that every reasonable economy in operation shall be effected, because the expenses of operation must all be paid by the public. (Pages 19–21, "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Sixty-sixth Congress, 1st Session, on H. R. 4373.")

of control, shall be relieved from the operation of all antitrust laws, Federal and State. (These provisions were further amended and strengthened by Emergency Railroad Transportation Act, 1933, c. 91, 48 Stat. 211, Title II, pp. 217–220.)

It is thus clear that in enacting Transportation Act, 1920, Congress sought to obtain, as far as feasible and practicable, the advantages of unified control which governmental operation had demonstrated, by providing for pooling, consolidations, mergers, and acquisitions of control wherever, upon application of the carriers and after full hearing, it was found by the Commission that it would be in the public interest to do so.

Congress did not attempt to force either consolidations or pooling. With knowledge that in a great many instances the carriers would willingly consolidate or merge, or pool their traffic or earnings, Congress opened the way for them to do so, if the regulatory body found after examination that public interest would be furthered thereby, and encouraged such cooperative activities by removing the barrier of the antitrust laws.

In *Piedmont & Northern Ry.* v. *Comm'n.,* 286 U. S. 299, 311–312, this Court said:

> The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy in-

tended. *Spokane & Inland Empire R. Co. v. United States*, 241 U. S. 344.

Therefore, the pooling provisions of section 5 should be read in the light of the purposes sought to be accomplished by Congress. If they be read as appellant suggests, the end sought will not be accomplished. For if two or more carriers seeking to pool their traffic or earnings can be blocked by a third carrier, not a party to the pooling, but seeking to prevent the pooling for its own reasons, by the simple expedient of withholding its assent, it seems clear the purpose of Congress will be defeated.

II

The certificate authorizing the Milwaukee to abandon operation under trackage rights over appellant's line is a valid exercise of the Commission's authority under section 1 (18) and (19).

Appellant, though centering its attack upon the order authorizing the pooling, challenges the validity of the certificate authorizing the Milwaukee's abandonment of operation over its line under trackage rights.

Because of the fact that the North Western's docks at Escanaba were still in good condition, while the Milwaukee's docks were worn out (R. 180, 256); that the switching from the yards of the North Western at Escanaba to the docks is more convenient, expedient and economical than from the Milwaukee's yard (R. 118–119, 121–122); that

the North Western has two lines from Iron Mountain to Escanaba, which can be used as a double track railroad, one for the movement of the loaded ore cars, the other for the empties (R. 117), with sufficient capacity to handle the peak volume of traffic, whereas the Milwaukee's and appellant's lines are both single track (R. 117, 120, 121); that the grades over the North Western to Iron Mountain are more favorable than those over the Milwaukee to Channing (R. 121), and for many other reasons (R. 120–122, 160), it was decided to use the North Western exclusively between Iron Mountain and Escanaba for the movement of the pooled ore traffic, with the consequent abandonment by the Milwaukee of its trackage rights for ore movement over appellant's line.

But the Commission would not approve the pooling arrangement unless the Milwaukee filed an application for a certificate, so that all parties concerned would have the opportunity to contest it. The Milwaukee later filed such an application, and, in accordance with the provisions of section 1 (19), the usual notice to the Governor of the State was given, as well as notice by newspaper publication. (R. 27.) Thereafter a further hearing was held and various interested parties appeared and introduced evidence, which disclosed the facts in detail.

The appellant and the others who appeared in opposition to the granting of the application feared

that the abandonment of the use of the appellant's line by the Milwaukee for the ore transportation would jeopardize appellant's revenues to such an extent as to lead to the abandonment of its line or a part thereof.

Upon the record presented the Commission found that the territory adjoining appellant's tracks is sparsely settled, (R. 16), the entire population along its line west of Escanaba being only 6,303 (R. 18); that the territory along its line was once heavily timbered but most of the heavy timber has now been cut out (R. 16), and while the territory has been settled by farmers to some extent, and small communities have sprung up near some of the stations—Ralph, Northland, and Watson each having about 75 to 80 people—the growth of agriculture has been slow (R. 16); that in 1935 the 18 intermediate stations on the line originated 46 carloads of potatoes, 5 carloads of sugar beets, 1 carload of hay and grain, 1 carload of machinery, and 544 carloads of forest products. (R. 16.)

The Commission also found other facts, including the total amount of freight carried by appellant during 1935 and preceding years, and its net income. (R. 16–17.) It was found that appellant's operations as a whole have been highly profitable, and no finding that its operations will become unprofitable after the Milwaukee abandons its operation over the line.

It was found that appellant paid 10 percent dividends in 1934 and 1935, and paid dividends aggregating 115 percent and paid off its entire funded debt during the period 1923–33.[88] (Report, R. 17; R. 308–309; Ex. 32, R. 374–A.)

The Commission made further findings indicating that even though the Milwaukee had bandoned its ore train operation over appellant's line in 1930, appellant would still have made profits in the 5-year period 1931–35. The report (R. 17) finds:

> The Escanaba Company has undertaken by exhibits to adjust its income statement for 1934 and 1935 to indicate the effect of abandonment of operation by the Milwaukee over its line. These adjustments include in operating expenses proportions paid by the Milwaukee, and exclude from non-operating income all sums received from the Milwaukee as joint-facility rents. On this basis it is calculated that, without the support received from the Milwaukee for use of its line under the trackage agreement in the years 1931–35, the Escanaba Company would have sustained losses amounting to $61,893, $36,220, $5,548, $9,448, and $5,653, respectively. These calculations do not take into consideration the payments which the Milwaukee would have continued to make under the agreement had the proposed aban-

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[88] As shown by Exhibit No. 32, the dividends were 10 percent in 1925, 1928, 1929, 1930 and 1932; 15 percent in 1926 and 1927, and 5 percent in 1923, 1924 and 1931.

donment of operation occurred at the end of 1930, or the possible savings in the expense of maintenance had the Milwaukee's ore trains ceased to operate over the line subsequent to that year.

The aggregate losses thus estimated by appellant aggregated $118,762 during the 1931–35 period. But the Milwaukee's minimum payment under the contract, amounting to $27,000 a year (R. 143, 168, 254, 272, 338), would have totaled $135,000 [sb] during this 5-year period, so that appellant would have earned at least $16,238, plus the amount it could have saved by reduction in maintenance expenditures due to the absence of the movement of the Milwaukee's heavy ore trains over its line.

As stated in the report (R. 17) a witness for the Milwaukee, experienced in the study of the earning capacity of system branch lines, expressed the opin-

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[sb] Plus certain amounts for amortization of past additions and betterments, approximating $1,234 per annum. See Par. 51, pooling contract, Exhibit No. 1, R. 338, and Par. 2, trackage right contract, Ex. F–1–A, R. 397.

Under the 1921 contract the value of the appellant's road was deemed to be $900,000, and the fair rental value of the road 6% of the total value, or $54,000 a year. This rental value was to be apportioned between the appellant and the Milwaukee on a usage basis, that is to say, the Milwaukee was to pay to appellant for the use of its road such proportion of $54,000 as its traffic over the road bore to the total business (spoken of as the wheelage basis) but never less than one-half, or a minimum amount of $27,000. Under the contract, the Milwaukee must pay this amount to appellant even though it makes no use whatever of the road. (R. 13, 35, 254, 256, Ex. F–1–A, R. 401.)

ion that the appellant can continue operation for years by virtue of economies in maintenance expenditures and reduced train service, and that, if and when further relief were needed, the portion of its line from Channing to Northland, 27.5 miles, might first be abandoned and the remainder operated, on a self-sustaining basis, as a branch from Northland to Escanaba and Wells. (R. 311–312.)

But there was no proposal to abandon any of appellant's operations or any part of its line, and it would not be possible to draw any definite conclusion upon the present record whether in the future any such abandonment would be necessary. There was no finding that any part of appellant's line or operations must or should be abandoned.

It was found that the Milwaukee is in a deplorable financial condition, having sustained net losses aggregating almost $90,000,000 during the 1930–35 period (R. 14; Exhibit 7, R. 354; Ex. F–4, R. 411–412), and that it could effect substantial economies through the ore pooling arrangement involving abandonment of its ore traffic operations over appellant's line.

It was therefore necessary for the Commission to weigh the economies to be effected by the pooling arrangement against the effect of such abandonment upon appellant's revenues. It found that—

> The Milwaukee and the North Western cannot be required to continue the service embracing the line of the Escanaba Company

> merely because of the undesirable effect of the discontinuance thereof upon the revenue of that company. (R. 19.)

Its conclusion was that public convenience and necessity permitted the abandonment and accordingly it issued the certificate.

It should be noted that the Commission did not attempt to adjudicate the rights of the parties to the trackage contract. In its first report, it said:

> The question of the cancellation of the lease is not before us. The rights and obligations of the parties under the contract is a matter for the courts to determine. (R. 37.)

Cf. *Central New England Ry.* v. *Boston & Albany R. R.*, 279 U. S. 415.

The court below, too, declined to pass upon the rights of the parties under that contract. It said (opinion, R. 424–425):

> It is important to observe that the abandonment authorized by the Commission does not relate to usual and ordinary railroad operations. It is limited to the discontinuance of operations by the Milwaukee Railroad under a contract for trackage rights relating principally to the transportation of iron ore. Continuance by plaintiff of operation by [of] the railroad is in no way limited. The trackage contract confers only a privilege.[9] It does not obligate the Mil-

[9] The contract, Exhibit F–1–A, R. 393, 395, provides:

"That the St. Paul Company [the Milwaukee] *may* at all times run its freight trains, manned by its own crews, over

waukee to make any use of plaintiff's track. The pooling arrangement approved by the Commission enables the Milwaukee to effect substantial economies which would not be available if it were compelled to continue to operate on plaintiff's line of railway under its contract for trackage rights. Under the trackage contract, the Milwaukee is obligated to make certain payments to plaintiff depending upon the volume of traffic, and it is subject to a minimum charge of $27,180 annually. Whatever rights plaintiff may have under that contract must be adjudicated in proceedings other than the present. The court fails to perceive that the order and certificate assailed deprive plaintiff of any legal right.

Although *Colorado* v. *United States,* 271 U. S. 153, deals largely with the question of conflict between federal and State authority over abandonments, its reasoning is equally applicable and controlling in the case of abandonments in purely in-

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and upon the premises aforesaid for the following purposes, and none other, viz: * * *." [*Emphasis* supplied.]

Nor did the Milwaukee guarantee any particular tonnage. It did agree that the annual rental for the use of the tracks should not be less than $27,000, regardless of the tonnage. (R. 401.) In 1932, when the tonnage was light, the rental, $27,180, was almost at the minimum. (R. 256.) If during any year its tonnage was so small that its proportionate amount of the rental figured less than $27,000, the only penalty was the payment of the minimum rental.

terstate operation, as here. In explaining the nature of the power exercised by the Commission in authorizing abandonments, the Court said, pp. 162–163:

> The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

Since the substantial economies which the Milwaukee will be able to effect as the result of the pooling arrangement with the North Western cannot be availed of if it is compelled to continue operation over appellant's line, the required continuance of this operation would place an undue burden upon interstate commerce, as definitely as would the continued operation of an unprofitable intrastate branch line. Where the line or branch to be abandoned is intrastate, the Commission must weigh the benefit to interstate commerce against the inconvenience and loss to which the other will thereby be subjected. *Colorado* case, 168. "Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare *Proposed Abandonment by Boston & Maine R. R.*, 105 I. C. C. 13, 16. The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate." (*Ibid.* 168.) Further, in the *Colorado* case, the Court said:

> In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, al-

> though the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect. (Pages 168–169.)

And the Court said (168)—*"The sole test prescribed is that abandonment be consistent with public necessity and convenience."* [Italics ours.]

This is also the test as to abandonment of operation under trackage rights. *Transit Commission* v. *United States,* 289 U. S. 121. It governs in the case at bar.

There is before the Court the case of two of the

country's important railway systems, both in the hands of trustees under the Bankruptcy Act, which have failed to earn a reasonable return and have operated at large deficits. As found in the Commission's report (R. 14) the Milwaukee during the last six years (1930–1935) has sustained net losses aggregating upwards of ninety million dollars.[10] In order to effect economies in their operations these carriers have agreed to pool certain of their traffic, as a result of which the Milwaukee will obviate the necessity of spending $1,000,000 for the construction of a new dock at Escanaba and the two carriers will save approximately $200,000 annually in economies that can be figured in dollars and cents and will save other substantial amounts that cannot be reduced to figures.

It is clear, therefore, that this pooling, effecting as it will substantial economies in the operation of important interstate carriers, is of national concern, and that the putting into effect of these economies is in the public interest.

The Commission's certificate permitting the abandonment is therefore a valid exercise of the authority conferred upon it by the Act.

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[10] Detailed figures are given in Exhibits Nos. 7 and F–4. The North Western has also sustained heavy net losses, as follows: 1931, $6,034,125; 1932, $11,216,820; 1933, $7,875,419; 1934, $8,276,194. Exhibit No. 9 (original exhibit not printed.)

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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FEBRUARY 1, 1938.

APPENDIX

The Interstate Commerce Act (U. S. C., Title 49) provides:

SECTION 1

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the contruction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings.

Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any

party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 5 [1]

(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commis-

[1] The Emergency Railroad Transportation Act, 1933, approved June 16, 1933, made numerous amendments to section 5 of the Interstate Commerce Act which have been carried into the following statement of the text. Secs. 201–208 of the Act cited.

sion, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

(2) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

(3) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission

is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also

such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.

(5) Whenever a corporation which is not a carrier is authorized, by an order entered under paragraph (4), to acquire control of any carrier or of two or more carriers, such corporation thereafter shall, to the extent provided by the Commission, for the purposes of paragraphs (1) to (10), inclusive, of section 20 (relating to reports, accounts, and so forth, of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a common carrier subject to the provisions of this part, and for the purposes of paragraphs (2) to (11), inclusive, of section 20a (relating to issues of securities and assumptions of liability of carriers), including the penalties applicable in the case of violations of such paragraphs, be considered as a "carrier" as such term is defined in paragraph (1) of such section, and be treated as such by the Commission in the administration of the paragraphs specified. In the application of

such provisions of section 20a in the case of any such corporation the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance by each carrier which is under the control of such corporation of its service to the public as a common carrier, will not impair the ability of any such carrier to perform such service, and is otherwise compatible with the public interest.

(6) It shall be unlawful for any person, except as provided in paragraph (4), to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (7), the words "control or management" shall be construed to include the power to exercise control or management.

(14) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraphs (1), (4), (10), or (11), as it may deem necessary or appropriate.

(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section

1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by such order.

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